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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

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DOUGLAS BURNS,

No. C 08-2995 RS

Plaintiff,

v.

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

CITY OF REDWOOD CITY, et al.,

Defendants.

I. INTRODUCTION

On April 1, 2007, plaintiff Douglas Burns had the misfortune of suffering a diabetic emergency in a very public setting. Several police officers apparently mistook his confused and erratic behavior for symptoms of intoxication and, ultimately, five officers wrestled him forcibly to the ground. Before the struggle ended with Burns bleeding and in handcuffs, the officers deployed pepper spray, nunchakus and a steel baton. The officers cited Burns for battery of a police officer and resisting arrest. An emergency medical technician who arrived at the scene to address any burns or irritation from the spray verified that Burns was in fact suffering from diabetic shock and administered treatment. This lawsuit arises out of that incident and seeks redress for the injuries Burns sustained. He advances several claims for relief against the officers in their individual capacities, as well as against Redwood City (the "City") and the Redwood City Police Department

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1 (the “Department”). The municipal defendants and individual police officers Jamie Mateo, David
2 Gough and Ramiro Perez move for summary judgment on all plaintiff’s claims.¹ For the reasons
3 stated below, Officer Perez is entitled to summary judgment on all claims asserted against him
4 under both federal and state law. Burns has not presented any material, disputed facts to support
5 either his *Monell* claim against the municipal defendants or his unlawful arrest claim and these are
6 also resolved at summary judgment in defendants’ favor. All other defense motions for summary
7 judgment are denied.

8 **II. RELEVANT FACTS**

9 Douglas Burns is a professional body-builder. In the spring of 2007, he was forty-six years
10 old, five feet, nine inches tall and weighed somewhere between 192 and 197 pounds. Sixth months
11 prior to the incident, Burns earned the title “Mr. Natural Universe,” which he represents reflects the
12 highest echelon in drug-free men’s body building. Burns also suffers from Type I diabetes, a
13 chronic condition diagnosed at the age of seven. Burns advocates for diabetes education and is the
14 co-author of *The Diabetes Antidote: An Exercise Prescription to Prevent Type 2, to Combat Type 1*.

15 Burns depends on insulin injections to regulate his blood sugar. If blood sugar levels drop
16 below the normal range, any diabetic can experience hypoglycemia, or insulin shock. Apparently, a
17 non-diabetic who experiences hypoglycemia will sense obvious alarms in response to the body’s
18 production of stress hormones. According to the plaintiff, a long-term sufferer can experience
19 something called “hypoglycemia unawareness,” where the body gradually stops producing stress
20 hormones. In such a case, the person may not become aware of a problem until blood sugar levels
21 plummet to a dangerous level. Severe symptoms often closely mimic the effects of intoxication by
22 drugs or alcohol. The basic training required of all police cadets in California lists the following
23 indicators of diabetic emergency: aggressiveness, combativeness, uncooperative behavior,
24 confusion, a dazed appearance, decreased level of consciousness, and impaired motor skills.

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¹ Officers Steven Sysum and Richard Harrington were named as defendants. Burns dismissed them
27 from his Complaint in December of 2009. In his opposition papers, Burns also makes clear that he
has voluntarily dropped the malicious prosecution and California Civil Code section 51.7 (the
“Ralph Act”) claim raised in his Complaint.

1 On the evening of April 7, 2007, Burns planned to catch the 7:00 screening of a film at the
2 Century 20 Theater in Redwood City. In the parking lot, sometime between 6:15 and 6:30, Burns
3 injected insulin into his arm in preparation for the theater popcorn he expected to eat. En route to
4 the ticket counter, Burns bumped into several people he knew (first, a group of teens who knew of
5 and admired his athletic pursuits and asked for training advice and, second, a couple with whom he
6 was friendly) and chatted with each. He testified that by the time he reached the front of the ticket
7 line, his blood sugar had begun to plummet and that he could no longer remember what film he
8 came to see or even clearly read the print listing the available screenings. Eventually, he was able
9 with some prompting to articulate his choice. He purchased a ticket and headed upstairs to the
10 candy counter. By the time he reached the front of that line, he was only able to explain that he
11 needed sugar. His request confused the sales clerk at the counter and she turned him away. Burns
12 then maneuvered toward a soda fountain, where he proceeded to fill a paper cup partially with soda,
13 pour it out, and repeat the process.

14 A theater employee asked a security guard to check on Burns. The guard, Mikhail Burlyga,
15 testified that when he asked if anything was wrong, Burns did not respond but seemed to sway
16 slightly from side to side. Burlyga assumed Burns was intoxicated and so escorted him down the
17 stairs, returned the seven dollars Burns had paid for his ticket, and led him out the theater's exit
18 doors. Concerned Burns might attempt to drive, Burlyga attracted the attention of a uniformed
19 police officer, Jamie Mateo, standing nearby. At roughly the same time, a second theater employee
20 telephoned the police to report Burns' strange behavior. When the dispatcher asked what Burns had
21 done, the employee replied, "Nothing really. He basically just looks like he's on something. He can
22 barely stand on his own." The dispatcher then alerted local officers that a man was loitering outside
23 the theater. Officer Mateo also received this information via radio.

According to Mateo, Burns was staggering about in circles, counting the loose dollar bills he held in his hands. Mateo also noted something strange about Burns' stride: his steps were quite pronounced and high. As Mateo approached Burns, Mateo distinctly noted that he could *not* smell alcohol on Burns' breath but did think that Burns otherwise appeared to be under the influence of

1 some sort of substance. Mateo asked Burns, "Sir, how can I help you?" He did not directly ask if
2 Burns was ill or in need of medical assistance. Then, Mateo asserts that Burns unexpectedly "kind
3 of" lunged toward him and uttered an expletive, along with several other incomprehensible phrases.
4 Plaintiff notes that no mention of the profanity or the lunge appeared in Mateo's police report.

5 Although the area in front of the theater was crowded with onlookers, no other witness saw
6 Burns lunge toward Mateo or heard him swear. Mateo avers he "felt threatened by Burns' behavior
7 and hulking physique." Within a matter of minutes, Sergeant Gough arrived. Gough also testified
8 that, as he approached the theater, Burns was disoriented, agitated and struggling to stand. Gough
9 says he levied a series of questions at Burns: "What's the matter? What's your name? How can we
10 help you?" Burns did not answer but instead parroted Gough's questions back to him. Gough later
11 testified that it crossed his mind Burns might be under the influence of drugs or in the midst of a
12 diabetic or other medical emergency. He did not, though, ask about Burns' medical needs. Because
13 Burns' movements appeared generally directed toward the theater's entryway, Gough positioned
14 himself between Burns and the door. Although the testimony of each officer differs somewhat, they
15 collectively attest that Mateo stood somewhere between five and fifteen feet away from Gough.

16 According to the officers, Burns walked directly toward Gough, as if in an attempt to reenter
17 the theater. Although Burns cannot actually remember much of the incident after his blood sugar
18 levels dipped, he speculates that he presumably wanted to return to the area where sugar was
19 available. Gough held up his hand against Burns' chest and told him to "stop." Burns then spun
20 around and "high-stepped" confusedly back toward Mateo. Burns reasons that Gough knocked him
21 off balance. A witness, David Morgan, told an interviewing officer that "[t]he man stumbled and
22 bumped into a police officer. Then the officer pepper sprayed the man in the face." Mateo insists
23 he was forcefully pushed. Gough testified that Burns shoved Mateo "with both hands" on the
24 officer's chest or shoulder area.² It was then that Mateo sprayed a two to three second stream of

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² The security guard, Burlyga, also stated in his deposition that he saw Burns push Mateo. Burns
26 points out, though, that Burlyga never mentioned this fact in the report he wrote after the incident or
27 in his interview with the RCPD. Apparently, Burlyga had applied for a position with the
Department and, after the incident, was in contact with Mateo. On at least one occasion, Mateo took
Burlyga for a "ride-along." Burlyga denies that the two discussed Burns' case in any detail. In his

1 pepper spray into Burns' face. Again, Mateo cites Burns' obvious strength, his bizarre behavior,
2 and the fact that the officers had yet to conduct any form of weapons search as justification for the
3 spray. Burns, who was clearly agitated, gripped his eyes with his palms and continued to walk
4 about in an even more confused manner. Gough ordered that Burns drop to the ground but he did
5 not respond. The security guard testified that he heard one of the officers tell Burns he was under
6 arrest.

7 It is not clear exactly how Gough and Mateo physically brought Burns to the ground, but it is
8 at least undisputed that roughly ninety seconds passed between when Mateo first approached Burns
9 and when the officers wrestled him to the ground. It was the attempt to handcuff Burns that proved
10 problematic. Gough and Mateo assert that Burns landed on his torso but with his hands folded
11 beneath his waist. While the officers agree that he never swung his arms or attempted to strike
12 them, they assert that he tensed up his body and limbs and would not submit to handcuffs. Mateo
13 was positioned on Burns' right side, Gough on his left, and both officers tried to gain control of the
14 closest arm. Mateo claims Burns at one point locked Mateo's hand in the space between Burns'
15 bicep and his ribcage. The officer insists this caused him great pain. As he was not strong enough
16 to yank it free, Mateo used the butt end of his nunchaku tool to strike Burns in the upper shoulder
17 area several times. Mateo did not discuss the pinned hand or any nunchaku blows in his report.

18 Burns vaguely remembers being thrust onto the pavement and can recall a painful sensation
19 in his shoulder, but otherwise remembers little of the struggle: "I remember snippets of being—I
20 remember my face being on the pavement. I remember smelling the pavement. I remember
21 smelling my blood. I remember being bent over and just locking down . . ." He disputes, though,
22 Mateo's theory that he needed to use the nunchaku to free his hand. Multiple witnesses, including
23 Officer Perez, who had arrived at the scene mid-fracas, testified that Burns' right arm was extended,
24 as if Burns were engaged in a one-armed push up. Burns argues that, from this position, it would be
25 unlikely that he would be able to maintain any sort of grip on Mateo's hand (or indeed, his entire
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27 deposition—which occurred after the ride-along—Burlyga mentioned for the first time that,
28 although certain other facts were fuzzy, he now distinctly remembered the push.

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1 “arm” as Mateo somewhat inconsistently testified) between his bicep and ribcage.

2 Gough, meanwhile, was similarly engaged on Burns’ left side. Apparently, he yanked and
3 pulled on Burns’ arm with such force that he tore and partially ruptured his own bicep. He states
4 that when he noticed Burns bracing his forehead into the pavement, as if for leverage, he began to
5 fear that Burns might be able to raise himself up off the ground. With his right hand, Gough drew
6 his collapsible tactical baton from his utility belt. He did not extend the baton but did deliver three
7 blows to Burns’ ribcage. Defense witness, Pastor Joel Vano, observed part of the struggle and later
8 sought out the department to provide his recollection. Vano testified that Gough did not raise the
9 baton more than eight inches before striking Burns. In his opinion, Gough did not deploy “a huge
10 amount of force” to do so. Pastor Vano also described Burns’ resistance as “strenuous.”

11 In the midst of this imbroglio, Officer Perez testified that he noticed Burns raise his hips
12 slightly from the ground as Perez pushed his head downward. Worried that Burns was gaining
13 leverage, Perez positioned himself at Burns’ head and wrapped his arms around Burns’ right arm
14 and head (plaintiff’s papers describe the position as a “half-nelson”). Perez used the strength of his
15 two arms to squeeze Burns’ head toward his right bicep. Officer Sysum arrived soon after and tried
16 to assist by grabbing Burns’ legs in something of a bear hug. Officer Harrington arrived last and
17 endeavored to help control Burns’ left arm. Plaintiff’s witness David Morgan stated that he saw at
18 least one of the officers kneel on Burns back and head area to force his face into the pavement.
19 Mateo then wrapped his nunchaku tool around Burns’ right wrist and cuffed that hand. Once both
20 wrists were cuffed, the officers pulled Burns up from the ground, asked him to sit in the doorframe
21 of a squad car, and called for medical assistance to wash away the pepper spray.

22 Before Burns received any medical attention, Mateo questioned him. Burns’ medical
23 witnesses explain that the adrenaline rush Burns experienced elevated his blood sugar levels slightly
24 and explains why he was actually able to confer with and answer Mateo’s questions. Mateo did not
25 recite any *Miranda* warnings but did tape record the conversation. The transcript reflects that Burns
26 did not seem to recall the struggle. When Mateo explained to Burns that he had resisted the officers,
27 Burns apologized. Burns then explained that he is a diabetic and was in need of sugar or

1 carbohydrates. When the medical team arrived, Burns was by that time seated on a planter, still in
2 handcuffs. Gough warned the medical team that Burns suffers from diabetes. An EMT, Ian Lee,
3 tested Burns' blood level. It was 26 mg/dl, or generally indicative (according to Burns' witnesses)
4 of life-threatening diabetic hypoglycemia. Lee administered oral glucose. When Lee relayed
5 Burns' blood sugar level to the officers, he testified that they seemed not to comprehend the
6 significance of the precise number. As he stated, "I think it was kind of dismissed. . . . I don't
7 believe that the police department is medically trained to understand what a blood sugar of 26 is."

8 Gough then told Mateo to cite Burns for violating California Penal Code sections 243(b) and
9 148: respectively, battery of a police officer and resisting arrest. Gough did so after he knew of
10 Burns' medical condition. Burns suggests the officer's knowledge of his condition made issuance
11 of the citations legally unsupportable. Gough and Mateo counter that determining whether a suspect
12 has the requisite mental capacity to commit these offenses is a prosecutor's rather than a police
13 officer's role. The county prosecutor dropped all charges within two months.

14 On the evening in question, Burns wore denim jeans and a red, long-sleeved Adidas brand
15 pullover. In photographs taken at the scene and according to witness testimony, Burns' sleeves
16 were rolled up to the elbows. Burns also claims he religiously wore a medical alert bracelet on his
17 left wrist. He insists it was on his arm that night. The bracelet is heavy, metallic and designed for
18 ready visibility. The words "MEDIC ALERT" are inscribed into its front in large red font and
19 "DIABETES – TAKES INSULIN – DOUGLAS CHRISTOPHER BURNS" is written across the
20 bracelet's back. Although Burns cannot remember how it came to be there, someone at the scene
21 apparently discovered the bracelet in Burns' pocket after the scuffle. The clasp was bent; Burns
22 reasons that the bent clasp at least raises the inference that the bracelet came off in the struggle. All
23 officers deny seeing the bracelet on his wrist.

24 As part of the requisite training at the police academy, all officers involved were trained to
25 identify and handle a diabetic emergency. The Police Officer Standards and Training ("POST")
26 handbook lists common indicators of insulin shock and points out that they "are similar to
27 indications of alcohol intoxication or substance abuse." The handbook then expressly warns that an
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1 officer should “never assume that a person exhibiting these indicators is intoxicated without further
2 questioning or assessment.” Former and current Redwood City Chiefs of Police, Carlos Bolanos
3 and Louis Cobarruviaz, agree that POST sets generally established standards for law enforcement
4 officers in California. Although the officers all agreed that they were duly trained at their respective
5 academies, they could not recall extensive significant, subsequent training. They do note that they
6 participated in First Aid training through the Department. As part of this training, the officers recall
7 viewing a video that addressed diabetic emergencies. Following the incident with Burns, however,
8 the department did devote several training sessions exclusively to the issue of just such emergencies.

9 Following the incident, Burns was transported to the San Mateo Medical Center Emergency
10 Room. He received further treatment for hypoglycemia. Burns also sustained a brachial plexus tear
11 which continues to bother him; bruising to the top of his head, nose, and the right side of his head; a
12 blood bruise to the trapezius area of his right shoulder; a bruise on his left back rib area slightly
13 larger than a silver dollar; scuffmarks on his hands, red lines around both wrists from either the
14 handcuffs or the nunchakus; and abrasions on his face. Burns contends that the brachial plexus tear
15 continues to plague him; he reports lingering numbness, tingling and weakness. His treating
16 physician, Dr. Greenwald, has indicated that he does not expect that Burns will fully recover. Burns
17 contends the brachial plexus injury has effectively curtailed his body building career.

18 III. LEGAL STANDARD

19 Summary judgment is proper “if the pleadings and admissions on file, together with the
20 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving
21 party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The purpose of summary
22 judgment “is to isolate and dispose of factually unsupported claims or defenses.” *Celotex v. Catrett*,
23 477 U.S. 317, 323-24 (1986). The moving party “always bears the initial responsibility of
24 informing the district court of the basis for its motion, and identifying those portions of the
25 pleadings and admissions on file, together with the affidavits, if any which it believes demonstrate
26 the absence of a genuine issue of material fact.” *Id.* at 323 (citations and internal quotation marks
27 omitted). If it meets this burden, the moving party is then entitled to judgment as a matter of law

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1 when the non-moving party fails to make a sufficient showing on an essential element of the case
2 with respect to which he bears the burden of proof at trial. *Id.* at 322-23.

3 The non-moving party “must set forth specific facts showing that there is a genuine issue for
4 trial.” Fed. R. Civ. P. 56(e). The non-moving party cannot defeat the moving party’s properly
5 supported motion for summary judgment simply by alleging some factual dispute between the
6 parties. To preclude the entry of summary judgment, the non-moving party must bring forth
7 material facts, *i.e.*, “facts that might affect the outcome of the suit under the governing law
8 Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The opposing party “must do more than simply show that there
9 is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio*,
10 475 U.S. 574, 588 (1986).

12 The court must draw all reasonable inferences in favor of the non-moving party, including
13 questions of credibility and of the weight to be accorded particular evidence. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) (*citing Anderson*, 477 U.S. at 255); *Matsushita*, 475 U.S. at
14 588 (1986). It is the court’s responsibility “to determine whether the ‘specific facts’ set forth by the
15 nonmoving party, coupled with undisputed background or contextual facts, are such that a rational
16 or reasonable jury might return a verdict in its favor based on that evidence.” *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). “[S]ummary judgment will not lie if
17 the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury
18 could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. However, “[w]here the
19 record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there
20 is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587.

23 IV. DISCUSSION

24 A. Section 1983 Claim Against Individual Officers and Qualified Immunity

25 Burns alleges that Mateo, Gough and Perez employed excessive force in violation of his
26 Fourth and Fourteenth Amendment right to be free from unreasonable search and seizure. Burns
27 grounds this claim on section 1983 of the Civil Rights Act. That section provides, in relevant part,

1 that:

2 Every person who, under color of any statute, ordinance, regulation, custom, or
3 usage . . . subjects, or causes to be subjected, any citizen of the United States or
4 other person within the jurisdiction thereof to the deprivation of any rights,
5 privileges, or immunities secured by the Constitution and laws, shall be liable to
the party injured in an action at law, suit in equity, or other proper proceeding for
redress

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7 Title 42 U.S.C. § 1983. The defendants deny that Burns has raised a triable issue of fact to
8 support the excessive force claim and also raise a defense of qualified immunity. Resolution of the
9 motion involves two questions: whether the force used was excessive, and, if so, whether the three
10 police officers are nevertheless entitled to qualified immunity either because the law was not clearly
11 established or because the officers made an objectively reasonable error in judgment.

12 The Supreme Court recently reexamined and refined the manner in which district courts are
13 to proceed when, in an excessive force case brought under section 1983, government officials assert
14 a qualified immunity defense. *See Pearson v. Callahan*, 129 S. Ct. 808 (2009). Under the
15 framework previously set forth in *Saucier v. Katz*, a district court was required to determine as a
16 threshold matter whether the plaintiff had shown the deprivation of a constitutional right. 533 U.S.
17 194, 205 (2001). If so, the court would then analyze whether the right violated was clearly
18 established in a “particularized . . . sense: . . . the relevant, dispositive inquiry . . . is whether it
19 would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”
20 *Saucier*, 533 U.S. at 201. In *Pearson*, the Court dropped *Saucier*’s requirement that district courts
21 adhere to the two-step sequence, especially where the “order of battle” framework required district
22 courts to grapple with difficult questions of constitutional law even where resolution of the second
23 prong would prove determinative. As the *Pearson* Court recognized, “while the sequence set forth
24 [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory.” *Pearson*, 129 S.
25 Ct. at 818.

26 1. Excessive Force

27 A claim that a police officer employed excessive force implicates the Fourth Amendment’s

1 prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989).
2 Accordingly, a police officer's actions are measured by a standard of objective reasonableness. *Id.*
3 at 397. The reasonableness of the force used to effect a particular seizure, in turn, is determined by
4 "careful[ly] balancing . . . 'the nature and quality of the intrusion on the individual's Fourth
5 Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490
6 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). More simply, "[t]he force which
7 [i]s applied must be balanced against the need for that force." *Liston v. County of Riverside*, 120
8 F.3d 965, 976 (9th Cir. 1997). See also *Alexander v. City and County of San Francisco*, 29 F.3d
9 1355, 1367 (9th Cir. 1994). The strength of the governmental interests depends on the "severity of
10 the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or
11 others, and whether he is actively resisting arrest." *Graham*, 490 U.S. at 396. It is also important to
12 appreciate that police officers "are often forced to make split-second judgments," and that therefore
13 "not every push or shove, even if it may seem unnecessary in the peace of a judge's chambers" is a
14 violation of the Fourth Amendment. *Id.* (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.
15 1973)). It is equally true, though, that even where some force is justified, the amount actually used
16 may be excessive. *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002) (citing *P.B. v. Koch*, 96 F.3d
17 1298, 1303-04 (9th Cir. 1996)).

18 The Ninth Circuit has emphasized that the balancing test just described "requires careful
19 attention to the facts and circumstances of each particular case . . ." *Santos*, 287 F.3d at 853
20 (quoting *Graham*, 490 U.S. at 396). See also *Deorle v. Rutherford*, 272 F.3d 1272, 1279-81 (9th
21 Cir. 2001). Because an excessive force claim "nearly always requires a jury to sift through disputed
22 factual contentions, and to draw inferences therefrom," the Ninth Circuit has also instructed that
23 summary judgment in excessive force cases should be granted sparingly. *Santos*, 287 F.3d at 853
24 (citing *Liston*, 120 F.3d at 976 n.10). "This is because police misconduct cases almost always turn
25 on a jury's credibility determinations." *Id.*

26 Here, a key disputed fact implicates the degree of threat Burns' posed: a witness not
27 associated with either party states that Burns merely stumbled and bumped into Mateo while the

1 officers insist Burns aggressively attacked him. Construing disputed facts in a light most favorable
2 to Burns, as the Court must on defendants' motion, a reasonable jury could find that the degree of
3 force employed was excessive in light of the corresponding governmental interests at stake. To the
4 extent Burns suggests that *no* amount of force can ever be reasonably levied against a mentally ill or
5 incompetent person who poses a risk of harm to himself or to others, he is in error. On the other
6 hand, Burns has raised a triable issue of fact as to whether the degree of force used *here* was
7 excessive as juxtaposed with the level of threat presented.

8 First, the intrusion on Burns' liberty was by no means insubstantial. Mateo deployed pepper
9 spray into Burns' face at close range for several seconds. Gough and Mateo then tackled him to the
10 pavement. In the struggle to handcuff him, Burns sustained Mateo's nunchaku and Gough's baton
11 blows and a torn brachial plexus from either Perez' half-nelson hold or some combination of the
12 above. Burns' physician, Dr. Greenwald, testified that Burns' brachial plexus may never fully heal
13 and will likely continue to cause pain and discomfort.

14 Next, the underlying "crimes" were not severe. The officers suspected Burns was
15 intoxicated in public and ultimately cited him for battery of an officer and resisting arrest. In
16 defendants' motion, they assert that Mateo deployed the pepper spray in response to Burns' sudden
17 attack, the failed prior verbal commands, and the fact that Burns had not yet been checked for
18 weapons. Burns insists he did not attack Mateo at all but was instead out of balance causing him to
19 tumble into the officer. There is no evidence that Mateo gave *any* verbal command (he asserts
20 instead that he asked general welfare questions) and no indication in the record that Burns was
21 armed. Mateo did not instruct Burns to step aside or calm down and he gave no warning that a
22 failure to do so would result in pepper spray. *Cf. Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th
23 Cir. 2001) (finding officer's use of beanbag shot against unarmed suspect could be unreasonable
24 where there was no indication that he considered less extreme tactics or that he warned the suspect
25 before firing). Burns is a strong man and, presumably, the receiving end of his out-of-balance
26 stumble could be unpleasant and even intimidating. Mateo does insist he felt this way. Even so, "a
27 simple statement by an officer that he fears for his safety or the safety of others," the Ninth Circuit

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1 has instructed, “is not enough” *Deorle*, 272 F.3d at 1281. “[T]here must be objective factors
2 to justify such a concern.” *Id.*

3 Moreover, the officers admit they suspected Burns was intoxicated or mentally ill. They
4 repeatedly use the term “psychotic” incident or episode to describe his behavior. Burns argues that,
5 in light of their POST training on diabetic emergencies and the prominent medic alert bracelet he
6 insists he wore that night, it also should have occurred to them that he was suffering from diabetic
7 shock. Indeed, Gough in his deposition highlights how the possibility of a diabetic emergency
8 crossed his mind. Burns’ correctly suggests that the condition itself has a role to play in the
9 reasonableness inquiry. In *Deorle*, the Ninth Circuit emphasized that a suspect’s apparent mental
10 incapacity should inform the officer’s approach:

11
12 The problems posed by, and thus the tactics to be employed against, an unarmed,
13 emotionally distraught individual who is creating a disturbance or resisting arrest
14 are ordinarily different from those involved in law enforcement efforts to subdue
15 an armed and dangerous criminal who has recently committed a serious offense.
16 In the former instance, increasing the use of force may, in some circumstances at
17 least, exacerbate the situation We do not adopt a *per se* rule establishing two
18 different classifications of suspects . . . [but] we emphasize that where it is or
19 should be apparent to the officers that the individual involved is emotionally
20 disturbed, that is a factor that must be considered in determining, under *Graham*,
21 the reasonableness of the force employed.

22 *Deorle*, 272 F.3d at 1282-83. *See also Bryan v. MacPherson*, 608 F.3d 614, 626 (9th Cir.
23 2010) (emphasizing that *Deorle*’s analysis applies to intermediate levels of force and finding that
24 the tasing of a mentally ill suspect without attempting less intrusive means could constitute
unreasonable force). *See also McAllister v. Price*, No. 10-1213, 2010 WL 3169326, at *14-16 (7th
Cir. Aug. 16, 2010) (finding that officer unreasonably “leapt” to conclusion that convulsing, semi-
conscious driver in the midst of diabetic shock was intoxicated and, as a result, force employed to
throw driver from vehicle and onto pavement was excessive).

25 Drawing all factual inferences as required at this juncture in Burns’ favor, a reasonable jury
26 could infer that Burns did not pose an immediate threat of harm to the officers, the theater patrons,
27 or to himself. The fact that only ninety seconds passed between the initial encounter and when

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1 Mateo deployed the pepper spray may suggest the officers lacked time to assess Burns' medical
2 needs but it could also indicate that the pepper spray was a premature and objectively unreasonable
3 response.

4 By any account, though, Burns resisted the officers' attempt to restrain him after the take-
5 down and the escalation of force employed (nunchakus, a baton, and the half-nelson grip)
6 corresponds to Burns' continued resistance. There is no evidence that the officers continued to beat
7 or struggle with Burns once he was handcuffed. Burns disputes that his resistance justified the
8 nunchakus (Burns reasons that Mateo's claim that his hand was pinned is unsupported by the facts),
9 the baton (Burns' expert suggests releasing one hand from the struggle to deploy the baton was
10 tactically unsupportable), and the half-nelson grip (again, the expert contends this grip was ill-
11 advised and ineffective). Yet, even assuming the officers' force was commensurate with Burns'
12 actions, the plaintiff argues the officers cannot invoke this later resistance as a defense where it was
13 provoked by an earlier (alleged) constitutional violation.

14 The Ninth Circuit's analysis in *Billington v. Smith* is particularly instructive here. 292 F.3d
15 1177 (9th Cir. 2002). The Court carefully reviewed circuit precedent defining the scope of liability
16 where an officer's ultimate use of force was objectively reasonable but followed on the heels of a
17 prior, unreasonable intrusion. *Billington* reiterated that, "where an officer intentionally or recklessly
18 provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation,
19 he may be held liable for his otherwise defensive use of deadly force." *Id.* at 1189. On the other
20 hand, "the fact that an officer negligently gets himself into a dangerous situation will not make it
21 unreasonable for him to use force to defend himself." *Id.* at 1190. This is because "[t]he Fourth
22 Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under
23 tort law, and negligent acts do not incur constitutional liability." *Id.* "An officer may fail to
24 exercise 'reasonable care' as a matter of tort law yet still be a constitutionally 'reasonable' officer."
25 *Id.* But if an officer's provocative actions are objectively unreasonable under the Fourth
26 Amendment, liability is established, and the question becomes the scope of liability, or what harms
27 the constitutional violation proximately caused. *Id.*

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1 As explained above, there are genuine issues of fact as to whether the pepper spray and the
2 take-down were constitutionally reasonable. Drawing all inferences in Burns' favor, it follows that
3 this initial aggression "provoked" and proximately caused the blows and trauma that came of the
4 struggle to handcuff Burns (including those inflicted by the other responding officers). Taking as
5 true Burns' assertion that Mateo never asked him to calm down or to step back or warned him
6 before the spray and tackle, a reasonable jury could also find that Mateo acted either intentionally or
7 recklessly. It is clear Burns resisted and that force was necessary to subdue him. Yet, if it was
8 unreasonable to pepper spray and tackle a disturbed man for his failure to answer welfare questions
9 and for stumbling, the officers should not be excused for the blows that followed seconds later when
10 he resisted handcuffs. To be clear, Burns has raised a triable issue of fact as to whether the spray
11 and take-down were constitutionally excessive, given the degree of threat Burns presented.
12 Similarly, there is a material question of fact as to whether such a violation "provoked" Burns'
13 resistance. Mateo and Gough's motion for judgment as a matter of law, therefore, cannot be
14 granted.

15 This analysis, however, does not so easily apply to Officer Perez, who was not involved or
16 even present during the initial encounter with Burns. When Perez arrived, his fellow officers were
17 already in the midst of a struggle to handcuff a suspect, and they were not having an easy time of it.
18 Perez pulled Burns' head and neck toward his bicep to cause pain, it is true, but he states that he
19 held the position only until Burns was handcuffed. Burns' expert testified that a half-nelson grip is
20 always unnecessarily painful and ineffective. Other than this testimony, however, Burns provides
21 no further evidence or explanation of how or why the technique is excessive in and of itself.
22 Usually, a plaintiff must do more than present an expert's opinion that a particular tactic is *per se*
23 unreasonable (otherwise, testimony of plaintiff's expert would always decide the constitutional
24 question). *See Billington*, 292 F.3d at 1188 ("[E]ven for summary judgment purposes, the fact that
25 an expert disagrees with the officer's actions does not render the officer's actions unreasonable.")
26 (citation and internal quotation marks omitted). In contrast, courts in this Circuit have frequently
27 recognized that a pain control grip or device can be employed to subdue a struggling suspect. *See,*
28

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1 *e.g., Brooks v. City of Seattle*, 599 F.3d 1018, 1026 (9th Cir. 2006) (discussing how hair control grip
2 or stun-level tasing may be appropriately deployed to control a suspect who refused to exit vehicle
3 following traffic stop). Without more, the expert's admonition of Perez's technique is not sufficient
4 evidence that the half-nelson grip was an unconstitutionally excessive response to Burns' resistance.
5 Accordingly, plaintiff fails to point to any facts, disputed or otherwise, in support of the claim that
6 Officer Perez employed constitutionally excessive force in confronting Burns.

2. Qualified Immunity

8 The doctrine of qualified immunity protects government officials “from liability for civil
9 damages insofar as their conduct does not violate clearly established statutory or constitutional
10 rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818
11 (1982). Qualified immunity balances two important interests: the need to hold public officials
12 accountable when they exercise power irresponsibly and the need to shield officials from
13 harassment, distraction, and liability when they perform their duties reasonably. *Id.* at 814. The
14 protection of qualified immunity applies regardless of whether the government official’s error is a
15 mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *See Butz v.*
16 *Economou*, 438 U.S. 478, 507 (1978) (noting that qualified immunity covers “mere mistakes in
17 judgment, whether the mistake is one of fact or one of law”). In other words, the “contours of the
18 right must be sufficiently clear that a reasonable official would understand that what he is doing
19 violates the right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). “This is not to say that an
20 official action is protected by qualified immunity unless the very action in question has previously
21 been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be
22 apparent.” *Id.*

23 Because qualified immunity is “an immunity from suit rather than a mere defense to liability
24 . . . it is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472
25 U.S. 511, 526 (1985) (emphasis omitted). The “driving force” behind creation of the qualified
26 immunity doctrine was a desire to ensure that “‘insubstantial claims’ against government officials
27 [will] be resolved prior to discovery.” *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987).

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1 Accordingly, the Supreme Court has repeatedly stressed the “importance of resolving immunity
2 questions at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

3 In short, the qualified immunity doctrine protects an officer’s reasonable mistake as to what
4 the law requires. At least as to the pepper spray and take-down, the state of the law is well-
5 established here in several respects. Most obviously, *Graham* instructs that an officer’s degree of
6 force must correspond to the perceived threat. Any reasonable officer should know that a “stumble
7 and bump” is not the same thing as an “attack,” especially if it is assumed that Burns never swore,
8 lunged toward, or pushed Mateo. *Deorle* and its progeny also establish that apparent mental illness
9 or incapacity often require tactics different from those designed for criminal suspects. Under the
10 facts advanced by the plaintiff, Burns’ obvious confusion and distress should have alerted Mateo
11 and Burns to the possibility that pepper spray and a tackle might exacerbate, not ameliorate, the
12 situation. Finally, *Billington* stands for the proposition that an unconstitutional provocation may
13 create liability for subsequent, but reasonable acts of force causally connected to the provocation.
14 The most recent of these cases, *Billington*, was decided eight years ago and all three continue to be
15 cited favorably in this circuit and this district.

16 That said, Mateo and Gough insist that they made a reasonable mistake of *fact* as to the level
17 of threat presented. Just as the question of whether a constitutional violation occurred here turns
18 entirely on whose facts to accept, so too does the question of immunity. More simply, if Burns
19 behaved as the officers contend, their mistake of fact might be objectively reasonable. If he did not,
20 the mistake may be deemed unreasonable.

21 The same cannot be said against Officer Perez’s qualified immunity defense. As noted
22 above, the record is devoid of any facts reflecting a constitutional violation by Perez. Yet, even if
23 such could be identified, the undisputed facts demonstrate that Perez is entitled to qualified
24 immunity. Multiple witnesses testified that Burns would not willingly submit to handcuffs.³ The
25 undisputed record certainly demonstrates that when Perez arrived on the scene, Mateo and Gough

26 ³ Even if he never swung at or kicked the officers, the plaintiff’s characterization of his conduct after
27 the take-down as “passive resistance” is not supported by any other witness. Especially as Burns
cannot *remember* much of the struggle, this characterization carries limited weight.

1 appeared to be struggling with a combative arrestee. In light of Burns' apparent strength and the
 2 physical positioning of the other officers, Perez explains he thought it made sense to focus on
 3 Burns' head and shoulder area. Given Perez' knowledge and Burns' resistance, there is no question
 4 that *some* force to subdue him was constitutionally appropriate. Burns does not disagree but argues
 5 the half-nelson itself was excessive. Plaintiff presents no case, and the Court is aware of none, that
 6 establishes the inappropriateness of the grip. To the contrary, at least one court in this district has
 7 recognized (although not in the qualified immunity context) that an officer's use of a *full* nelson
 8 choke grip was likely not excessive. *See Redmond v. San Francisco Police Dep't*, No. 07-4276,
 9 2010 WL 2573978, at *4 (N.D. Cal. June 25, 2010) (recognizing that officer's "full-nelson sleeper
 10 grip" was not necessarily excessive where suspect attempted to swallow contraband). As detailed in
 11 the prior segment, courts also often uphold as reasonable various pain control grips deployed against
 12 resisting suspects. Even assuming Perez's conduct was constitutionally infirm, the law making it so
 13 was not settled and his mistake would have been a reasonable one. Officer Perez is therefore
 14 immune from liability.⁴

15 B. Monell Liability

16 The municipal defendants move for judgment as a matter of law on Burns' *Monell* claim. In
 17 *Monell v. New York City Department of Social Services*, the Supreme Court held that a municipality
 18 can be found liable under section 1983 only where the municipality itself causes the constitutional
 19 violation. 436 U.S. 658 (1978). Respondeat superior or vicarious liability does not attach under
 20 section 1983. *Id.* at 694-95. "It is only when the execution of the government's policy or custom . . .
 21 . inflicts the injury that the municipality may be held liable under [section] 1983." *City of Canton,*
 22 *Ohio v. Harris*, 489 U.S. 378, 385 (1989) (citation and internal quotation marks omitted). The
 23 Ninth Circuit has also established that "a local governmental body may be liable if it has a policy of
 24 *inaction* and such inaction amounts to a failure to protect constitutional rights." *Mortimer v. Baca*,
 25

26 ⁴ As reflected in *Billington*, otherwise reasonable force may still result in compensable injury where
 27 the initial law enforcement encounter does not pass constitutional muster. Accordingly, an issue of
 fact remains as to whether Officers Mateo and Gough are responsible for any injury incurred by
 Burns as a result of the actions of Perez.

1 594 F.3d 714, 716 (9th Cir. 2010) (*citing Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992)).
2 Specifically, a municipality may be held liable for inadequate training of police officers if the failure
3 to train amounts to “deliberate indifference” to the constitutional rights of persons with whom its
4 officers may come into contact. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 124 (1992);
5 *City of Canton*, 489 U.S. at 388-89. As the Supreme Court explained in *City of Canton*, “it may
6 happen that in light of the duties assigned to specific officers or employees the need for more or
7 different training is so obvious, and the inadequacy so likely to result in the violation of
8 constitutional rights, that the policymakers of the city can reasonably be said to have been
9 deliberately indifferent to the need.” 489 U.S. at 390. “In that event, the failure to provide proper
10 training may fairly be said to represent a policy for which the city is responsible, and for which the
11 city may be held liable if it actually causes injury.” *Id.*

12 The Court in *City of Canton* further explained that, “the focus must be on adequacy of the
13 training program in relation to the tasks the particular officers must perform.” *Id.* at 390. “That a
14 particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city,
15 for the officer’s shortcomings may have resulted from factors other than a faulty training program.”
16 *Id.* at 390-91 (*citing Springfield v. Kibbe*, 480 U.S. 257, 268 (1987); *City of Oklahoma City v. Tuttle*,
17 471 U.S. 808, 821 (1985)). “Neither will it suffice to prove that an injury or accident could have
18 been avoided if an officer had had better or more training, sufficient to equip him to avoid the
19 particular injury-causing conduct,” as “[s]uch a claim could be made about almost any encounter
20 resulting in injury, yet not condemn the adequacy of the program to enable officers to respond
21 properly to the usual and recurring situations with which they must deal.” *Id.* at 391. Finally, “for
22 liability to attach . . . the identified deficiency in a city’s training program must be closely related to
23 the ultimate injury.” *Id.* This means that, here, Burns must present evidence that the deficiency in
24 training caused the police officers’ unreasonable force.

25 Unlike the question of the reasonableness of the force employed by the individual officers,
26 the facts relating to officer training are not in dispute. The parties agree that diabetes is a fairly
27 common disease in the United States; the municipal defendants point out that their officers have

1 handled diabetic emergencies in the past without incident. Burns acknowledges that the officers did
 2 receive POST training specifically related to such emergencies in their respective academies (in
 3 particular, the officers were told never to assume a suspect exhibiting symptoms of intoxication is
 4 not actually in the midst of insulin shock), but points out that the Department lacks any written
 5 policies or guidelines on handling diabetic emergencies. The Department counters that its officers
 6 *do* receive periodic first aid training, even if the Department has never codified such guidelines in
 7 writing. Specifically, the officers in this case testified that part of this training involves a brief video
 8 that discusses the care of citizens in diabetic shock.

9 Accordingly, undisputed evidence reveals that the officers here *were* trained that the
 10 symptoms of diabetic shock mirror those of intoxication, that they should be alert to medic-alert
 11 jewelry and that a sufferer may not appreciate the wrongfulness of his or her conduct. Here, the
 12 municipal defendants argue that the situation escalated rapidly and that there was no time for the
 13 more fulsome assessment envisioned in the officers' training, that those officers did ask welfare
 14 questions, that Burns might have been dangerous even if he was incapacitated, that those officer did
 15 not see an alert bracelet, and that even if they did not appreciate the legal meaning of his precise
 16 blood sugar level, they routed him to prompt medical care. Certainly, there may be a question of
 17 fact as to whether the officers *followed* their training in all meaningful respects. The very fact that
 18 Burns can measure their behavior against a fairly concrete list of requirements imbued at some point
 19 in their training suggests, however, that the department was not "indifferent" to the need for training
 20 here. The municipal defendants' motion for judgment as a matter of law on Burns' *Monell* claim
 21 must therefore be granted.⁵

22 C. California Bane Civil Rights Act Claim

23 California Civil Code section 52.1 establishes a claim for relief "against anyone who
 24 interferes, or tries to do so, by threats, intimidation, or coercion, with an individual's exercise or
 25 enjoyment of rights secured by federal or state law." *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 331

26 ⁵ Burns acknowledged at oral argument that his plea for injunctive relief was designed to
 27 accompany his *Monell* claim. Accordingly, the defendants' motion is granted as to Burns'
 injunctive relief plea as well.

1 (1998). Burns relies on the same excessive force argument detailed above to support this claim.
 2 Because the federal claim has survived Gough and Mateo's motion, so too must the state claim
 3 survive. Unlike under the federal counterpart, the municipal defendants may be held vicariously
 4 liable for an officer's violation of section 52.1. Cal. Gov't Code § 815.2(a). As the City and
 5 Department advance no arguments and present no evidence to indicate that Burns is precluded from
 6 recovering under this theory, their motion for summary judgment is denied.⁶

7 D. False Arrest

8 The defendants further seek summary judgment on Burns' false arrest claim. Although it is
 9 not entirely clear from his Complaint, it seems that Burns grounds this claim under both section
 10 1983 and state law. Burns argues that the officers lacked probable cause to arrest him, not at the
 11 time of the initial seizure, but when Mateo issued the two citations.

12 A warrantless arrest of an individual in a public place for a crime committed in an officer's
 13 presence violates the Fourth Amendment if the arrest is not supported by probable cause. *See, e.g.*,
 14 *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Probable cause to arrest exists when
 15 officers have knowledge or reasonably trustworthy information sufficient to lead a person of
 16 reasonable caution to believe that an offense has been or is being committed by the person being
 17 arrested. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The Ninth Circuit has also defined probable cause
 18 as follows: "when, under the totality of the circumstances known to the arresting officers, a prudent
 19 person would have concluded that there was a fair probability that an individual has committed a
 20 crime." *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007); *Gasho v. United States*, 39
 21 F.3d 1420, 1428 (9th Cir. 1994). While conclusive evidence of guilt is of course not necessary
 22 under this standard to establish probable cause, "[m]ere suspicion, common rumor, or even strong
 23 reason to suspect are not enough." *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984) (*citing*
 24 *Henry v. United States*, 361 U.S. 98, 101 (1959)). Moreover, an arrest without probable cause is
 25 always an unreasonable seizure. *McKenzie v. Lamb*, 738 F.2d 1005, 1007 (9th Cir. 1984).

26

⁶ For the same reasons discussed above regarding the absence of any basis to proceed against
 27 Officer Perez on Burns' federal claims, plaintiff's state law claims against that officer are subject to
 summary judgment.

1 The officers insist that probable cause warranted the initial seizure. Although Burns argues
2 the force deployed in the process was unreasonable, this does not mean the officers lacked probable
3 cause to arrest him, at the very least, for public intoxication. *See* Cal. Penal Code § 647(f). Burns'
4 unlawful arrest claim focuses instead on the two citations Gough ultimately issued. These were for
5 battery of an officer and resisting arrest. At the time Gough instructed Mateo to issue them, Gough
6 was at least aware of Burns' medical condition. Burns argues it should have been obvious to the
7 officers that his mental incapacity created a legal defense to these crimes. Accordingly, he contends
8 probable cause no longer existed and that the citations were legally unsupportable.

9 In response, Burns advances a theory of "continuing arrest," and relies on the Ninth Circuit's
10 "dissipating probable cause" analysis from *United States v. Lopez*. 482 F.3d at 1072-74. There, the
11 Court recognized that, "[i]n some instances there may initially be probable cause justifying an arrest,
12 but additional information obtained at the scene may indicate that there is less than a fair probability
13 that the defendant has committed or is committing a crime." *Id.* at 1073. "In such cases, execution
14 of the arrest or continuation of the arrest is illegal." *Id.* (*citing United States v. Ortiz-Hernandez*,
15 427 F.3d 567, 574 (9th Cir. 2005) ("A person may not be arrested, or must be released from arrest,
16 if previously established probable cause has dissipated.")); *Bigford v. Taylor*, 834 F.2d 1213, 1218
17 (5th Cir. 1988) ("As a corollary . . . of the rule that the police may rely on the totality of facts
18 available to them in establishing probable cause, they also may not disregard facts tending to
19 dissipate probable cause.")). More simply, Burns suggests that once Gough knew of his medical
20 condition, probable cause dissipated and he should have been released, not cited.

21 Defendants argue that this is essentially what happened. First, they point out that Burns was
22 no longer "seized" for purposes of the constitutional inquiry when the citations were issued. *See*
23 *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004) ("A seizure occurs when a law
24 enforcement officer through coercion, physical force or a show of authority, in some way restricts
25 the liberty of a person.") (internal quotation marks omitted). The officers removed the handcuffs so
26 that Burns could receive medical treatment and did not detain him further. At the time Mateo wrote
27 the citations, Burns was in the midst of receiving medical care. He was taken to the hospital, not the
28

1 police station, and he was free to leave. At the time the citations were issued, defendants insist, the
2 arrest was over. *See, e.g., White v. City of Laguna Beach*, 352 F. Supp. 2d 1143, 1155 (C.D. Cal.
3 2010) (“[T]he mere issuance of a citation does not even constitute a seizure let alone a formal
4 arrest.”). Moreover, all charges against Burns were later dropped.

5 Defendants’ analysis is more apt. At the time Mateo issued the citations, Burns was no
6 longer under arrest. As the undisputed facts reflect that probable cause supported the initial seizure,
7 defendants’ motion for judgment as a matter of law as to the unlawful arrest claim must be granted.

8 **E. Negligence, Intentional Infliction of Emotional Distress, Battery Claims**

9 All defendants seek summary judgment on Burns’ claims of negligence, intentional
10 infliction of emotional distress and battery. As against the officers, these claims all focus on the
11 physical force deployed. Burns relies on a theory of respondeat superior to tie his emotional distress
12 and battery claims to the municipal defendants. As against them, Burns contends that the City and
13 Department’s alleged failure to train the officers as well as their tolerance for unlawful conduct
14 constituted actionable negligence.

15 Defendants’ motion relies solely on an immunity defense. They suggest that section 835a of
16 the California Penal Code as well as sections 820.2 and 815.2 of the California Government Code
17 create immunity from suit where officers act reasonably and within the provisions of the state and
18 federal constitution. Section 835a provides that “[a] peace officer who makes or attempts to make
19 an arrest need not retreat . . . nor shall such officer be deemed an aggressor or lose his right to self-
20 defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome
21 resistance.” Section 820.2 employs similar language and hails from the California Tort Claims Act.
22 That provision privileges police officers’ discretionary decisions made during arrests. *See*
23 *Blankenhorn v. City of Orange*, 485 F.3d 463, 487-88 (9th Cir. 2007) (*citing Price v. County of San*
24 *Diego*, 990 F. Supp. 1230, 1244 (S.D. Cal. 1998); *Martinez v. County of Los Angeles*, 47 Cal. App.
25 4th 334, 349 (1996)).

26 These provisions plainly do *not* apply, however, to officers who use *unreasonable* force in
27 effecting an arrest. *See id.* (*citing Scruggs v. Haynes*, 252 Cal. App. 2d 256, 262 (1967) (“[A] peace

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1 officer making an arrest is liable to the person arrested for using unreasonable force.”); *Robinson v.*
2 *Solano County*, 278 F.3d 1007, 1016 (9th Cir. 2002)). Notably, the Ninth Circuit in *Blackenhorn*
3 rejected a defendant’s request for summary judgment on an emotional distress claim where material
4 facts could support a finding of excessive force. *Id.* at 487 n.17. The Court reasoned that excessive
5 force could qualify as the elemental requirement of “outrageous” conduct. Because there is a
6 question of material fact as to whether the use of force employed by Officers Gough and Mateo was
7 objectively reasonable, their argument is unpersuasive. Those officers’ motion for judgment as a
8 matter of law on the negligence, battery and emotional distress claims must be denied.

9 The municipal defendants cite to section 815.2 of the California Government Code for their
10 immunity argument. That section provides: “A public entity is liable for injury proximately caused
11 by an act or omission of an employee of the public entity within the scope of his employment if the
12 act or omission would, apart from this section, have given rise to a cause of action against that
13 employee or his personal representative.” Cal. Gov’t Code § 815.2(a). This provision clearly
14 allows for vicarious liability of a public entity when one of its police officers uses excessive force in
15 making an arrest. *Blackenhorn*, 485 F.3d at 488 (*citing Mary M. v. City of Los Angeles*, 54 Cal. 3d
16 202, 215 (1991) (“[A] governmental entity can be held vicariously liable when a police officer
17 acting in the course and scope of employment uses excessive force or engages in assaultive
18 conduct.”)). Neither the City nor the Department argues that the arresting officers were acting
19 outside the scope of their duties. Because the arresting officers are not entitled to summary
20 judgment on the use of unreasonable force, neither are the municipal defendants entitled to
21 immunity from liability under Government Code section 815.2. All defense motions for judgment
22 as a matter of law on these claims must therefore be denied.

23 **V. Conclusion**

24 Construing the facts and drawing inferences in a light most favorable to Burns, a reasonable
25 jury could find that Officers Mateo and Gough used excessive force in response to the threat Burns
26 posed. Under the facts Burns presents, moreover, material disputes remain regarding whether the
27 officers made an objectively reasonable mistake of law or fact such that qualified immunity cannot

1 operate as a defense, at least at this procedural phase. Officer Mateo and Gough's motion for
2 summary judgment of all claims—state and federal—that assume a constitutional violation
3 involving excessive force or assert an immunity defense must be denied. Officer Perez's conduct, in
4 contrast, did not operate as a constitutional violation and, in any case, he has demonstrated that he
5 may assert qualified immunity. Perez' motion is granted as to all claims, grounded on either federal
6 or state law, advanced against him. Finally, the officers' motion for summary judgment on Burns'
7 false arrest claim must be granted.

8 The municipality's motion for summary judgment on Burns' *Monell* claim similarly must be
9 granted. As Burns' plea for injunctive relief assumed a *Monell* violation, this plea must be denied as
10 well. Insofar as the municipal defendants may be held vicariously liable for the officers' conduct
11 under state law, it remains a party in this action to the extent of those claims.

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14 IT IS SO ORDERED.

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16 Dated: 08/25/2010
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RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

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